open-handed to all, and self-sacrificing to the last degree for his family and friends. No labor was too arduous for him to undertake for those of whom he was fond. No student ever came to him for help and went away without receiving kind and patient attention and assitance from one who himself hardly knew the meaning of intellectual difficulty.

Roy Wilson White was a man of the purest character and the most exemplary life. He was uncompromising in his stand for what he felt was right, though never offensive to those opposed to his views. By his dropping from the ranks, the community suffers a distinct loss. Such citizens as was he, are too scarce in public life, and the crying need in private life is for men of such character as was his. But more notable is the loss occasioned the University by his death. A foundation had just fairly been laid for a career which must have redounded greatly to the credit of Roy Wilson White and to the honor of the University of Pennsylvania. Sad enough to see the aged professor lay down his life at the end of a career crowded with the fragrance of duty well done, of service to thousands of loyal and loving pupils now gone forth to useful lives. Infinitely more sad to behold a career which promised, and had begun the fulfillment of such a mission—and much more—cut off in the bud. But even the foundation rightly and truly builded stands for something positive, and every friend of Roy White knows that the structure he reared in his short term of building will stand, and stand for a reminder to others that it is worth while to have lived and to have lived aright.

O. J. R.

DANIEL STILZ DOREY.

Mr. Dorey was born in Philadelphia, June 8, 1877, the son of Daniel and Mary Jane Sansom Dorey. He was prepared at Penn Charter and Brown Preparatory School, and entered Pennsylvania in 1895, in the Wharton School. Mr. Dorey then entered the Law Department and took his degree in 1899. He was a member of Phi Delta Theta fraternity, and was business manager of THE AMERICAN LAW REGISTER during 1898–1899. Mr. Dorey died at Colorado Springs, April 9 last.

NEGLIGENCE—LIABILITY FOR CAUSING DEATH—ACTION OF DAMAGES. *Union Traction Company* v. *Fetters*, 99 Fed. Rep. 214 (1900).

In this case some interesting questions of negligence were brought up before the Circuit Court of Appeals for the Third Circuit, and the Court, per Dallas, J., showed a gratifying tendency to cease making qualifications and exceptions and special rules and to get back to general principles.

The defendant contracted for the construction of a smoke-stack, to consist of a shell of steel lined with brick. When the contractors

for the steel part were near the top those for the brick work commenced work below, upon the assurance of the defendant (their chief engineer, more precisely) that the workmen should be protected from danger from those above by a floor to be constructed above them. Such a floor was constructed, but the defendant, for a temporary purpose, cut a hole through and subsequently a timber, falling from above, passed through the floor and killed the plaintiff's husband, who was a bricklayer working below.

The gist of Judge Dallas' opinion follows: "The refusal of the (lower) court to rule that under all the evidence the plaintiff was not entitled to recover, would perhaps be sufficiently supported if rested upon the ground that the defendant's interference with the platform amounted to such an assumption of direction and control as to preclude it from asserting that the work was done wholly by an independent contractor. *Pender* v. *Raggs*, 178 Pa. 337 (1896). But our judgment rests upon a broader basis. It is not necessary to hold that the duty of the defendant to exercise reasonable care for the avoidance of injury to the bricklayer resulted from any doctrine which is peculiar to the relation of master and servant, for the general rule that every one is, in his acts and conduct, bound to be duly careful to avoid doing hurt to others was made plainly applicable by the circumstances of this case. Fetters did not go into the stack as a mere volunteer, but upon the invitation of the defendant, and in reliance upon its assurance that a protective platform would be provided to secure his safety. The defendant justified this reliance by erecting a suitable platform; but, having done this, its conceded right to impair the efficiency of the structure, temporarily and for a rightful purpose, was coupled with the duty to restore it to its original condition within a reasonable time after that purpose had been accomplished. The question whether the defendant did or did not discharge this duty and whether, if it did not, the killing of Fetters resulted from its failure to do so, was properly left to the jury for determination."

A few of the cases cited from Bigelow Cas. Torts (1875), Note 708, may properly be inserted at this juncture: *Snow* v. *Housatonic R. R. Co.*, 8 Allen 441 (1864); *Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572, 586 (1869); *Walsh* v. *Peet Valve Co.*, 110 Mass. 23 (1872); *Patterson* v. *Wallace*, 1 Macq. H. L. Cas. 748 (1854); *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. Cas. 266 (1858); *Mellors* v. *Shaw*, 1 Best & S. 437 (1861); *Ashworth* v. *Stamvix*, 30 L. J. Q. B. 183 (1861); *O'Byrne* v. *Barne*, 16 Ct. Sess. Cas. (2d series) 1025 (1854); *Bartonshill Coal Co.* v. *McGuire*, 3 Macq. H. L. Cas. 300 (1858); *Roberts* v. *Smith*, 2 Hurl. & N. 213 (1857); *Williams* v. *Clough*, 3 Hurl. & N. 258 (1858); *Behrens* v. *G. N. R. R. Co.*, 6 Hurl. & N. 365 (1861); *Grizzle* v. *Frost*, 3 Fost. & F. 622 (1863); *Skipp* v. *E. C. R. R. Co.*, 9 Ex. 223 (1853); *Watling* v. *Oastler*, L. R. 6 Ex. 73 (1871).

Such a decision needs but little comment, the excellence of its reasoning and its wise adherence to first principles is self-sufficient. The decision may be regarded as marking a new line of cases, but, as we said at the outset, it shows a gratifying tendency to get back

to first principles. It does credit alike to the court which uttered it and to the judge who framed it.

NATIONAL BANKS; ASSESSMENT ON STOCKHOLDERS; CONCLUSIVENESS OF COMPTROLLER'S ACTION.—The question of the conclusiveness of assessments levied on stockholders of national banks that have failed, though seemingly well settled, was again brought up in *Aldrich* v. *Campbell*, 97 Fed. 663, (1899). Campbell was a shareholder in the Tacoma National Bank to the extent of one hundred shares. In December, 1894, the bank closed its doors, and the appellant, Aldrich, was subsequently duly appointed receiver by the Comptroller of the Currency, after the resignation of Anderson, his predecessor in the receivership. In April, 1895, upon a proper accounting, made by the receiver of the bank to the Comptroller, and upon a valuation of the uncollected assets remaining in the receiver's hands, it appeared to the satisfaction of the Comptroller of the Currency that in order to pay the debts of the bank it would be necessary to enforce the individual liability of the stockholders thereof as prescribed by the Revised Statutes of the United States, sections 5151 and 5234. Accordingly an assessment of sixty-five dollars a share was levied upon the stockholders. This assessment Campbell paid. A further assessment of seventeen dollars per share he refused to pay, alleging that there were funds enough in the receiver's hands to pay the bank's liabilities. The receiver then commenced an action at law against him, whereupon he filed this bill in equity, alleging the facts as above stated, and alleging also that he could not interpose these facts in defending the action at law; he concluded by praying for an interlocutory order restraining Aldrich from prosecuting the action. Aldrich filed a demurrer to this bill, which was overruled and Campbell's application granted, whereupon this appeal was taken.

In reversing the lower court, Circuit Judge Morrow said: "It is well established that the Comptroller of the Currency is vested, by virtue of the national banking law, with authority to determine when it is necessary, in winding up the affairs of an insolvent bank, to enforce the liability of the stockholders, and power to levy assessments accordingly; that such determination and any action thereon are conclusive upon the stockholders,and not to be questioned in any litigation that may ensue. *Kennedy* v. *Gibson*, 8 Wall 498, (1869); *Casey* v. *Galli*, 94 U. S. 673, (1876); *Bank* v. *Case*, 99 U. S. 628, (1878); *Richmond* v. *Irons*, 121 U. S. 27, 7 Sup. Ct. 788, (1887); *Bushnell* v. *Leland*, 164 U. S. 684, 17 Sup. Ct. 209, (1897); *Bank* v. *Mathews*, 29 C. C. A. 491, 85 Fed. 934, (1898); *Nead* v. *Wall*, 70 Fed. 806 (1895); *Young* v. *Wempe*, 46 Fed. 354, (1891); *Welles* v. *Stout*, 38 Fed. 67, (1889); *Aldrich* v. *Yates*, 95 Fed. 78, (1899)."

In *Kennedy* v. *Gibson*, *supra*, at page 505, it was said by Justice Swayne, speaking for the court, "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether a whole or a part,

and if only a part, how much shall be collected. These questions are referred to his judgment and discretion; and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him." This case was decided in 1869, shortly of the passage of the national banking laws, and has been followed in every case since that time.

"The appellee in the present case does not deny the authority of the Comptroller as declared by the above decisions, but he seeks to avoid the effect of such authority by contending that while, in an action on the part of a receiver of a national bank to recover an assessment, no defence can be interposed by the stockholder to such an action, however excessive and wrongful the assessment may be, nevertheless the stockholder in such a case may restrain the receiver by a bill in equity to enjoin such action. In support of this contention he relies upon an observation of Mr. Justice Swayne in delivering the opinion in *U. S.* v. *Knox*, 102 U. S. 422, (1880). 'Although assessments made by the Comptroller, under the circumstances of first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction.'"

The court disposes of this contention by pointing out, first, that the Supreme Court of the United States in this case said that nothing in their opinion was intended to affect the authority of *Kennedy* v. *Gibson* and *Casey* v. *Galli*, which they distinctly affirmed; secondly, that the stockholders in the Knox case were some of them insolvent, and that to levy a second assessment would be to make the solvent stockholders liable for the insolvent, a liability distinctly repudiated by the Revised Statutes of the United States. "This last statement, as to what a court of equity would do, was limited to the facts of that case (the Knox case), and clearly ought not to be extended to facts of a wholly different character."

While the court here very clearly distinguishes Justice Swayne's dicta, yet the Supreme Court of the United States has never touched upon it. It might be that in a particular, though perhaps isolated case, the Comptroller might exceed his lawful rights and authority, it would then be hard indeed were any court to hold that equity could not review his decision. In our opinion equity would do so. We do not mean by this to criticise the decision in the case at bar, for upon all the facts it was well considered and ably rendered.

BANKRUPTCY; "FIDUCIARY CAPACITY" AND "MISAPPROPRIATION."—The case of in *Re* Basch (November, 1899), 97 Fed. 761, deciding that a debt owed by a commission merchant to his principal for goods consigned to be sold on commission, is not a debt created by "fraud, misappropriation or defalcation, or while

acting in a fiduciary capacity," within § 17 of the Bankrupt Act, disposed in a summary manner of a point which was a fruitful source of discussion under the Acts of 1841 and 1867.

Under the present Act the only new question which can arise is as to the meaning of the word "misappropriation"; for the interpretation of the words "fraud" and "fiduciary capacity" must be regarded as having been definitely settled under both of the prior Acts. *Chapman* v. *Forsyth*, 2 *How.* 202 (1844), construing the Act of 1841, decided that "fiduciary capacity" included only technical trusts; and that the debt of a cotton factor to his principal was released by a discharge. The Act of 1867, § 34, dealing with discharges, did not enumerate specific trusts, as did the Act of 1841, but its phraseology was almost identical with § 17, subdiv. 4, of the present Act. This portion of the Act of 1867 was disposed of in *Hennequin* v. *Clews*, 111 U. S., 676 (1883), wherein it was held that damages arising from the conversion by a pledgee of the property pledged to him, did not constitute a debt created by "fraud" or by one "while acting in a fiduciary character." In view of the similarity between the last and the present Acts this ruling, it seems, should be final.

In construing the word "misappropriation" in *Re* Basch the Court said, "the term 'misappropriation' in the present Act is even less appropriate to the transaction sued on than the term 'fiduciary capacity'; and the reasoning in the cases cited [*Chapman* v. *Forsyth; Hennequin* v. *Clews, supra; Neal* v. *Clark*, 95 U. S. 704 (1877)] that excludes the latter, excludes the former also."

Neal v. *Clark* decided that in the Act of 1867, "fraud" meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law. The ruling was based upon the fact that it was grouped with the words "defalcation" and "embezzlement," and that they all referred to kindred acts.

Although the decision in the present case cannot be considered as final, and it is not unlikely that there will by a variety of adjudications on the same point, yet as in *Re* Basch follows in the light of the strong judicial reasoning enunciated in the Supreme Court, it seems that it ought to stand.